FILE COPY

FILED
Mar 14
FEB 17 19
CHARLES ELMORE C
C

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931

No. 158

AMOS SHRIVER
Appellant,

vs.

WOODBINE SAVINGS BANK OF WOODBINE, IOWA,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA

BRIEF OF L. A. ANDREW, SUPERINTENDENT OF BANKING OF THE STATE OF IOWA, AMICUS CURIAE AND MOTION TO SUBMIT SAME AND PRESENT ORAL ARGUMENT ON SUBMISSION

JOHN FLETCHER, Attorney General of Iowa,

EARL F. WISDOM, Assistant Attorney General,
Counsel for Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931

No. 158

AMOS SHRIVER

Appellant,

vs.

WOODBINE SAVINGS BANK OF WOODBINE, IOWA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA

BRIEF OF L. A. ANDREW, SUPERINTENDENT OF BANKING OF THE STATE OF IOWA, AMICUS CURIAE AND MOTION TO SUBMIT SAME AND PRESENT ORAL ARGUMENT ON SUBMISSION

JOHN FLETCHER, Attorney General of Iowa,

EARL F. WISDOM, Assistant Attorney General,

Counsel for Amicus Curiae.

MOTION OF L. A. ANDREW, SUPERINTENDENT OF BANKING OF THE STATE OF IOWA TO FILE BRIEF AMICUS CURIAE AND TO PRESENT ORAL ARGUMENT ON SUBMISSION

Comes now L. A. Andrew, superintendent of banking of the State of Iowa, and respectfully moves the Court for leave to file a brief amicus curiae in the within and fore-

going cause and to present oral argument to this Honorable Court on the submission of the said cause thereto, and as grounds therefor states:

Paragraph 1. That he is the duly appointed, qualified and acting superintendent of banking of the State of Iowa, and that as such it is incumbent upon him under the statutes of the said state and the opinions of the Supreme Court thereof, to maintain the solvency of banks organized under and existing by virtue of charters granted to them by, and incorporated under, the laws of the said state:

Par. 2. That the within cause involves the constitutionality of the statutes of the State of Iowa, which provide the method by which, or through which, he may require stockholders to pay assessments for the purpose of repairing, impaired capital stock in said banks; and therefore, affects not only the administration of the banks incorporated under the statutes of the State of Iowa, and the maintenance of solvency of those institutions, but also the rights of depositors in those institutions in so far as the maintenance of their solvency is concerned; and that the issues involved in the said cause are of highest importance to the public, and other persons including depositors in banks chartered under the laws of the State of Iowa.

WHEREFORE, your petitioner prays that he be granted leave to file his brief amicus curiae, and that his counsel be permitted to present oral argument upon the submission of this cause to this Court.

L. A. Andrew, Superintendent of Banking
of the State of Iowa.

By John Fletcher, Attorney General of Iowa,
Earl F. Wisdom, Assistant Attorney General,
His Counsel.

INDEX

Page

Allen vs. Scott, 104 Ohio (1922); 436; 135 N. E. 683.... 29

Anderson vs. The Commonwealth, 18 Grattan 59 (Va.) 295 at 299..... 15

Andrew vs. Peoples State Bank of Humboldt, 234 N. W. 542 at 546..... 37

Avondale Land Company, et al. vs. Shook, et al., 170 Ala. 379; 54 So. 268..... 9

Bank of Blytherville vs. State, 148 Ark. (1920) 504; 230 S. W. 550..... 29

Bernheimer vs. Converse, 206 U. S. 516; 27 S. Ct. 755 at 759; 51 L. ed. 1164.....43, 53, 54

Bryan vs. Bullock, 84 Fla. (1922) 179; 93 So. 182..... 27

Brotherhood of American Yeoman vs. Mantz, 23 Ariz. 610; 206 Pac. 403 at 405.....43, 44

Citizens Sav. Bank vs. Owensboro, 173 U. S. 636..23, 25, 32

Commonwealth vs. Barney, 24 Ky. L. R. 2352..... 38

Croninger vs. Bethel Grove Camp Grounds Assoc., 161 S. W. (Ky.) 230-232..... 3

Davis vs. Moore, 130 Ark. (1917) 128; 197 S. W. 295.... 27

Dozier vs. Thornton, 19 Ga. 325..... 9

Duke vs. Force, 120 Wash. (1922) 599; 208 Pac. 67.... 30

Gardner vs. Hope Ins. Co., 9 R. I. (1869) 194; 11 Am. Rep. 238 17

Gary vs. St. Joe Mining Company, 34 Utah, 497..... 24

Greenwood vs. Union Freight R. Co., 105 U. S. 13..22, 25, 58

Gregg vs. Granly Mining Co., 164 Mo. 616 at 627..... 16

Henley vs. Myers, 215 U. S. 373; 30 S. Ct. 148 at 152; 54 L. ed. 240.....55, 56

Hill vs. Merchants Mutual Insurance Co., 134 U. S. 515; 10 S. Ct. 589; 33 L. ed. 994.....48, 53

Hinckley vs. Schwartzchild, 95 N. Y. S., 357; 107 N. Y. 470 22

In re Oliver Lee & Company's Bank; 21 N. Y. (1860) 9... 20

In re Reciprocity Bank, 22 N. Y. (1860) 9..... 22

Johnson vs. Libby, 111 Me., 204; 88 Atl. 647 at 649..... 47

LaMar vs. Taylor, 141 Ga. 227.....46, 47

INDEX

Page

Leach vs. Arthur Savings Bank, 203 Iowa 1052; 213 N. W. 772 37

Looker vs. Maynard, 179 U. S. 46; 45 L. ed. 79 ..... 22, 23

Lynch vs. Jacobson, 55 Utah 129 48

McGowan vs. McDonald, 111 Calif., 57; 52 Am. St. Rep. 149; 43 Pac., 418 21

Moore vs. Ripley, 106 Ga., 556 44

Noble vs. Haskell, 219 U. S. 104 30

Northwestern Trust Company vs. Bradbury, 117 Minn., 83; 134 N. W. 513 30

Sherman vs. Smith, 1 Black (U. S. 1861) 587; 17 L. ed. 163 21

South Bay Meadow Dam Co. vs. Gray, 30 Maine (1859) 547 ..... 19, 20

St. John vs. Building and Loan Assoc., 136 Iowa, 448 24

Somerville vs. St. Louis M. & M. Co., 46 Mont., 268; 127 Pac. 464; L. R. A. 1915-B 811 18

Trustees of Dartmouth College vs. Woodward, 4 Wheaton, 518; 4 L. ed. 629 12

Waggoner vs. Flack, 188 U. S. 595; 23 S. Ct. 345 at 348; 47 L. ed. 609 ..... 36, 49, 50, 51

Winfree vs. Riverside Cotton Mills, et al., 113 Va. 717, 75 S. E. 309 ..... 9, 14

Yoncalla State Bank vs. Gemmill, 134 Minn. 334 24

Section 1090, Code of Iowa 1873 ..... 12, 24

Section 1619, Code of Iowa 1897 ..... 12, 24

Section 1879 and 8, Code of Iowa 1897 6

Section 8376, Code of Iowa 1924-7 ..... 12, 24

Sections 9246, 9247, 9248, 9249, Code of Iowa 1924 ..... 11, 12, 34

Chapter 29, Laws Twenty-fifth General Assembly 39, 40

Chapter 181, Laws Forty-first General Assembly codified as Section 9248-a1, Code of Iowa 1927 ..... 33, 35, 37, 41

Cook on Corporations, 8th Ed. Para. 492-3 8

Lewis' Sutherland on Statutory Construction, 2d. Ed. Vol. 2, Sec. 340 ..... 38, 39

Story's Commentaries on the Constitution, Section 459 38

STATEMENT OF THE CASE

The statement of the case by the appellant found in his brief is a fair and complete statement of the facts in this cause and sets forth all of the matters necessary for the determination thereof. The opinion is found in 236 N. W., p. 10.

BRIEF POINTS AND AUTHORITIES RELIED UPON TO SUSTAIN THE FINDINGS AND OPINION OF THE SUPREME COURT OF IOWA

I

The articles of incorporation of a corporation, together with the statutes, constitute the contract:

a. Between the state and the corporation;

b. Between the corporation and its stockholders;

c. Between the State and the stockholders;

d. Between the stockholders inter sese.

Thompson on Corporations, third edition, Volume 1, Section 210;

Cook on Corporations, 8th Ed., Paragraph 492-3;

Croninger vs. Bethel Grove Camp Grounds Asso., 161 S. W. (Ky.) 230-232;

Avondale Land Company vs. Shook, 170 Ala. 379, 54 So. 268;

Dozier vs. Thornton, 19 Ga. 325;

Winfree vs. Riverside Cotton Mills, 119 Va. 717.

II

The legislature of the State of Iowa has reserved to itself, long prior to the incorporation of the appellee bank, the power to alter, abridge or set aside by law, the articles of incorporation of a corporation, and such reserved power is a part of the contract between the corporation and the state, and between the stockholders and the state; and such alteration, pursuant thereto, is not an impairment of the obligation of the contract, in violation of Section 10, Article 1, Constitution of the United States, nor of due process clause of the Fourteenth Amendment thereto.

Section 1090 Code of Iowa 1873;

Section 1619 Code of Iowa 1897;

Section 8376 Code of Iowa 1924-7;

St. Joe I. M. & St. Paul R. R. Co. vs. St. Paul, 173 U. S. 404;

Winfree vs. Riverside Cotton Mills, 113 Va. 717, 75 S. E. 309;

Somerville vs. St. Louis M. & M. Co., 46 Mont. 268, 127 Pac. 464, L. R. A. 1915-B 811;

Anderson vs. The Commonwealth, 18 Gratten (59 Va.) 295 at 299;

Avondale Land Co. vs. Shook, 170 Ala. 379, 54 So. 268;

Greenwood vs. Union Freight R. Co., 105 U. S. 13;

Arkansas Stove Co. vs. State, 94 Ark. 27, 27 L. R. A. 255;

Gregg vs. Granby Mining Co., 164 Mo. 616 at 627;

Citizens Savings Bank vs. Owensboro, 173 U. S. 636;

In re Lee's Bank of Buffalo, 21 N. Y. 9;

Sherman vs. Smith, 1 Black 587, 17 Law Ed. 163;

Hinckley vs. Schwartzchild, 95 N. Y. S. 357, 107 N. Y. 470;

Looker vs. Maynard, 179 U. S. 46, 45 L. ed. 79;

Citizens National Bank vs. Kentucky, 217 U. S. 443, 54 L. ed. 832;

Gardner vs. Hope Insurance Co., 9 R. I. 194; 11 Am. St. Rep. 238;

Stockwell vs. Supreme Court I. O. F., 216 Fed. 205, at 207;

McGowan vs. McDonald, 111 Calif. 57, 52 Am. St. Rep. 149, 43 Pac. 418;

South Bay Meadow Dam Co. vs. Gray, 30 Me. 537;

In re Reciprocity Bank, 22 N. Y. 9.

III

A banking corporation is a corporation of such public character and peculiar nature that it comes within the meaning of the legislative control section, and its charter may be altered, or amended, by law to increase the liability of the stockholders under the reserved power of the legislature whenever the legislature deem it for the public good.

Davis vs. Moore, 130 Ark. (1917) 128, 197 S. W. 295;

Bryan vs. Bullock, 84 Fla. (1922) 179, 93 So. 182;

Anderson vs. Commonwealth, 18 Grat. (Va. 1868) 295;

Bissell vs. Heath, 98 Mich. (1894) 472, 57 N. W. 585;

Deloria vs. Atkins, 158 Mich. (1909) 232, 122 N. W. 559;

Garner vs. Hope Ins. Co., 9 R. I. (1869) 194, 11 Am. Rep. 238;

In re Oliver Lee & Co.'s Bank, 21 N. Y. (1860) 9;

South Bay Meadow Dam Co. vs. Gray, 30 Maine (1859) 547;

In re Reciprocity Bank, 22 N. Y. (1860) 9;

Sherman vs. Smith, 1 Black (U. S. 1861) 587, 17 L. Ed. 163;

McGowan vs. McDonald, 111 Ga. (1896) 57, 43 Pac. 418, 52 Am. St. 149;

Hagmayer vs. Farley, 23 N. Y. (App. Div.) (1897) 426, 48 N. Y. S. 336;

Bank of Blytherville vs. State, 148 Ark. (1920) 504, 230 S. W. 550;

Allen vs. Scott, 104 Ohio (1922) 436, 135 N. E. 683;

Duke vs. Force, 120 Wash (1922) 599, 208 Pac. 67.

IV

The appellant stockholder was liable for an assessment under the provisions of Sections 1878 and 1879 of the Code of Iowa, 1897 (Sections 9246-7-8, Code of 1924), and the statute challenged herein, Chapter 181 Laws of the Forty-first General Assembly (Section 9248-A1 Code of Iowa 1927) provided merely for a method of enforcing that liability, and does not impose any additional liability upon the appellant.

Section 1879-8 Code of Iowa 1897;

Sections 9246-9247-9248-9249 Code of Iowa 1924;

Chapter 181 Laws Forty-first General Assembly codified as Section 9248-a1 Code of Iowa 1927;

Bernheimer vs. Converse, 206 U. S. 516, 27 S. Ct. 755 at 759, 51 L. ed. 1163;

Henley vs. Myers, 215 U. S. 373, 30 S. Ct. 148 at 152, 54 L. ed. 240;

Waggoner vs. Flack, 188 U. S. 595, 23 S. Ct. 345 at 348, 47 L. ed. 609;

Conley vs. Barton, 260 U. S. 677, 43 S. Ct. 238, 67 L. ed. 456;

Hill vs. Merchants Mutual Insurance Co., 134 U. S. 515, 10 S. Ct. 589, 33 L. ed. 994;

Barnitz vs. Beverly, 163 W. S. 118, 16 S. Ct. 1042, 41 L. ed. 93;

Brotherhood of American Yeoman vs. Manz, 23 Ariz. 610, 206 Pac. 403 at 405;

Johnson vs. Libby, 111 Me. 204, 88 Atl. 647 at 649.

V

Such change in remedy for the enforcement of said liability did not impair the obligation of the stockholder's contract, nor deprive him of property without due process of law.

See cases cited in Division IV.

ARGUMENT

I

The articles of incorporation of a corporation together with the constitutional and statutory provisions in force and effect at the time relating to corporations constitute the contract.

A. Between the state and the corporation,

B. Between the state and the stockholders,

C. Between the corporation and the stockholders,

D. Between the stockholders inter sese.

The burden of appellant's argument is that Chapter 181, Laws of the Forty-first General Assembly of Iowa, and codified as Section 9248-a1 of the Code of Iowa 1924, providing for judgment against him after his stock in the appellee bank was sold to repair impaired capital stock, is in violation of the obligation of his contract in violation of Article 1, Section 10 of the Constitution of the United States and deprives him of his property without due process of law.

It is, therefore, incumbent upon the court to determine what constituted the contract between the appellant stockholder and the State of Iowa, prior to the enactment of Chapter 181, Laws of the Forty-first General Assembly, which became effective March 13, 1925.

It is both elementary and fundamental that the constitution and statutes relating to corporations and in force and effect at the time of the reincorporation and renewed charter of appellee in May, 1911, were a part of the contract and that the articles of incorporation including those constitutional and statutory provisions, constituted the contract between the appellant stockholder and the State of Iowa.

Cook on Corporations, Eighth Edition, Volume 2, Section 492.

That authority lays down the following rule:

> "The charter of a corporation having a capital stock is a contract between three parties and forms the basis of three distinct contracts. The charter is a contract between the state and the corporation; second, it is a contract between the corporation and the stockholders; *third, it is a contract between the stockholders and the state.*" (Italics are ours.)

The above quotation was quoted with approval in the case

of *Avondale Land Company and Others vs. Shook and Others,* 170 Ala. 379 at 384, with the following significant comment:

> "The charter is under the protection of said clause (section 10, article 1, Constitution of the United States) of the federal constitution in all three of its aspects as a contract."

In *Dozier vs. Thornton,* 19 Ga. 325 at 327, the court speaking through Mr. Justice McDonald, said:

> "When the charter of the Planters' and Mechanics' Bank was offered to the persons named therein and other persons who might become stockholders, the eleventh section was a part of it, *and each individual, no doubt, considered it for himself as by his acceptance of it, it would become his contract and he would be bound by all its provisions. The charter must be construed then, as the contract of the defendant in error, and the eleventh section of the charter is a part of it.* If he is liable, it is his own voluntary undertaking." (Italics are ours.)

In *Winfree vs. Riverside Cotton Mills, et al.,* 113 Va. 717, the Supreme Court of that state said:

> "The charter which is to be so held is not only a contract between the state and the corporation, but is *also a contract between the state and the stockholders,* the corporation and the stockholders, and between the stockholders themselves." (Italics are ours.)

The above holdings were adopted by the Supreme Court of Iowa; and must be kept in mind throughout the consideration of this case.

II

The State of Iowa, both by constitutional provision and by statute, long prior to the granting of the charter of appellee bank reserved to itself the power to alter, amend or abridge the articles of incorporation of corporations, and all laws passed in regard thereto, and such alteration, when exercised subsequently thereto, being a part of the contract, cannot be an impairment of the obligation of the contract, nor denial of due process of law.

The appellant complains that the legislature by the enactment of Chapter 181 Laws of the Forty-first General Assembly (Section 9248-a1 Code of Iowa 1927) impaired the obligation of his contract, *in that it imposed upon him an additional liability not in existence at the time he acquired the stock. Granting, for the sake of argument in this division, but not conceding that contention, the act challenged did not so impair the obligation of his contract for the reason that by section 1090, Code of 1873, hereinafter set out, the legislature specifically reserved unto itself that right.*

Bearing in mind that the articles of incorporation and the statutes in effect at the time of the reorganization and the renewal of the corporate existence of the appellee bank and of the acceptance of stock in 1911 in the same by the appellant stockholder, we proceed to a consideration of the construction of that contract.

As a part of that contract, the statutes of the State of Iowa in effect at that time provided that whenever the capital stock of any state or savings bank became impaired by losses or otherwise, the Superintendent of Banking (at that time Auditor of State) *might require "an assessment upon the stockholders"* to repair the impairment; that the board

of directors shall cause such deficiency to be made good by a *"ratable assessment on the stockholders"* for the amount of stock held by them; and that should any stockholder *"neglect or refuse to pay his assessment"* within ninety days that a sufficient amount of the stock held by him should be sold to make good the deficiency. Notice, which must include *"the amount due from the stockholder,"* and procedure of sale were outlined in the statute.

The exact provisions (Code of Iowa, 1924, sections 9246, 9247, 9248) were as follows:

"9246. Impairment of capital stock—assessments. Should the capital stock of any state or savings bank become impaired by losses or otherwise, *the superintendent of banking may require an assessment upon the stockholders,* and shall address an order to the several members of the board of directors of such bank, fixing the amount of assessment required.

"9247. Compliance with order. *The board of directors, shall,* within thirty days after the receipt of such order, *cause such deficiency to be made good by a ratable assessment upon the stockholders* for the amount of stock held by them, by giving such stockholders notice in writing, signed by the president or vice president, attested by the cashier or secretary of the bank, under its seal, if it have one, and deposited in the post office, addressed to the last known residence of the stockholders, proof thereof to be made by the affidavit of the person so making the deposit, which notice shall state the entire sum to be raised, and the amount due from the addressed stockholder.

"9248. Assessment enforced. *Should any stockholder neglect or refuse to pay his assessment* within ninety days from the date of mailing notice thereof, the board of directors shall cause a sufficient amount of the capital stock held by such stockholder to be sold at public auction to make good the deficiency, after giving thirty days' notice thereof or by posting the same in the

bank, and publishing it in some newspaper of the county in which the bank is located, which notice shall recite the assessment made, *the amount due thereunder from the stockholder,* and the time and place of sale; proof of all which may be made in the manner provided in the preceding section." (Italics are ours.)

The rule that the charter of a corporation is a contract was early announced in *Trustees of Dartmouth College vs. Woodward, 4 Wheaton,* 518, 4 l. ed. 629. In the cited case, it was held that the charter of a corporation was a contract and within the protection of Section 10, Article 1 of the Constitution of the United States which provides that "no state shall pass any law impairing the obligation of a contract."

In the cited case, however, in the concurring opinion of Mr. Justice Story, it was said:

> "If the legislature mean to claim such an authority, it must be reserved in the grant."

The legislature of the State of Iowa made such a reservation and such reservation was in effect long before the original incorporation of the appellee bank and the purchase of stock by the appellant stockholder and before the reincorporation and renewal of the charter in 1911.

The legislative reservation, or so-called legislative control section, of the statutes in Iowa in effect on the later date and from 1873 are found in Section 1619 of the Code of Iowa, 1897, and provide as follows:

> "*The articles of incorporation,* by-laws, rules and regulations of *corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder,* shall at all times be

subject to legislative control, and *may be at any time altered, abridged or set aside by law,* and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, *whenever the general assembly shall deem necessary for the public good.*"

From this it will be observed that the legislature of the State of Iowa reserved the power to alter, amend, or abridge the articles of incorporation of the appellee bank whenever the General Assembly deemed it necessary for the public good and *since this section was in effect when the appellant stockholder purchased his stock, it is a part of his contract with the State of Iowa, and the consideration for the change of his contract with the State of Iowa, is the determination of the legislature that a change or amendment was necessary for the public good.*

Appellant apparently concedes that the legislature might have such power if the increased liability were for the benefit of a creditor but contends that the change in this case was for the benefit of the corporation itself.

In this we contend appellant's error lies. The statutes of the State of Iowa and the opinions of the Supreme Court thereof, make it the duty of the Superintendent of Banking to maintain the solvency of banks, not for the benefit of the institutions themselves, but for the public good. The Superintendent of Banking does not represent the banks in this capacity, but represents the public depositors in the bank and it is for the protection of those public depositors that this statute was enacted. Appellant also contends that the legislative control section applies only to that portion of the contract which relates to the dealings of the corporation with the state. It is our contention that the legislative control section applies as much to the contract between the

stockholder and the state as it applies between the corporation and the state and in support of that contention we cite *Winfree vs. Riverside Cotton Mills*, 113 Va. 717 at 722, where the court of that state said:

"* * * The charter which is to be so held is not only a contract between the State and the corporation, *but is also a contract between the State and the stockholders*, the corporation and the stockholders, and between the stockholders themselves. *The provision that the charter shall be held after such amendment* under the provisions and subject to all the requirements, terms, and conditions of the Constitution, and of any laws passed in pursuance thereof, so far as applicable, *is not limited to the relations between the State and the corporation, but applies as well to the relations between the State and the stockholders*, * * *

"That this is the construction which should be placed upon the language used is shown by the construction which has generally, if not universally, been placed upon the language reserving the power to the State to amend, alter, or repeal a charter. *Although the power reserved is to alter, amend, or repeal the charter, it is not limited to changes or alterations solely between the State and the corporation, but authorizes amendments and alterations, within certain limitations, directly affecting the stockholders in their relations to the State*, to the corporation, and to each other.

"In *Looker vs. Maynard*, supra, the power to alter or amend, etc., reserved to the State, it was held, authorized the legislature to give the right of cumulative voting to each stockholder.

"Under a like power it was held in *Anderson vs. Commonwealth*, 18 Gratt. (59 Va.) 295, that, although the charter of an express company did not make the stockholders personally liable for debts of the company, the legislature had the power to so modify the charter as to make them personally liable. See, also, *Lord vs. Equitable Life Assurance Society*, 194 N. Y. 312, 87 N. E.

443, 22 L. R. A. (N.S.) 420; *Gregg vs. Granby &c. Co.*, 164 Mo. 616, 65 S. W. 312."

The question involved in the cited case was the power of the legislature to authorize corporations to consolidate or merge into a general corporation with any other corporation organized for carrying out the same or a similar business by a majority vote of the stockholders. The complainant was a minority stockholder who claimed that the act there in question was affecting his rights as a minority stockholder and forcing him into a new contract without his consent.

In the case of *Anderson vs. Commonwealth*, 18 Grattan (59 Va.) 295, the court had under consideration a statute which made the stockholders of a corporation personally liable for the debts of the company although the charter provided otherwise. In the cited case, at page 299, the court said:

> "It was further contended that the imposition of such a personal liability on the stockholders, when the legal effect of the charter was to exempt them from any personal liability for debts of the company, was a violation of the contract between the stockholders and the State.
>
> "By the last clause of the charter, it was made subject to modification or repeal, at the pleasure of the General Assembly. Sess. Acts, 1865-6, p. 381. The stockholders, by accepting the charter, assented to that reservation as a constituent part of their contract. *Crease v. Babcock*, 23 Pick. R. 334; *Durfee v. Old Colony and Fall River R. R. Co.*, 5 Allen's R. 230. *And it has been expressly held, that the Legislature may, by virtue of such a reservation, provide by a subsequent statute, that stockholders shall be personally liable for all debts of the corporation incurred after its passage. Stanley v. Stanley*, 26 Maine R. 191; *Sherman v. Smith*, 1 Black's U. S. R., 587. *Stockholders who become such, or con-*

tinue to be such, after such a liability has been imposed, must be understood as agreeing to incur it. In this case, the act imposing the personal liability was passed on the 15th day of February, 1866, and the first payment of taxes for which the plaintiff in error was held liable, became due on the 15th day of March, 1866. In the case in 26 Maine, the objection was taken, as it was in this case, that the reserved power of amendment must be exercised by a special act for that purpose, and that the liability of the stockholders could not be altered by a general law; but it did not prevail. *In the case in 1 Black, the personal liability was imposed by the constitution of the State, and by a general law applicable to all banks.*"

In *Gregg vs. Granby Mining and Smelting Company,* 164 Mo. 616, the court had under consideration a statute which changed the voting power of the stockholders and permitted cumulative voting.

In discussing the legislative control section which provided that the charter of every corporation granted after the passage of the act should be subject to alteration, suspension, or repeal in the discretion of the legislature, the court, at page 627, said:

"Since the suggestion of Mr. Justice Story, in *Dartmouth College v. Woodward,* 4 Wheaton (U. S.) 518, that if the power to control, alter or amend the charter was reserved in the charter itself, no doubt could exist as to the power of the Legislature to amend or alter the charter, the various Legislatures of this Union have availed themselves of that suggestion and reserved such power either in general laws applicable to all charters as the General Assembly of Missouri has in section 7 of chapter 34, Revised Statutes 1845 and 1855, or incorporated it in subsequently granted special charters. (*Pacific Railroad v. Renshaw,* 18 Mo. 210.)

"The Supreme Court of the United States, as recently as October 18, 1900, in *Looker v. Maynard,* Atty.

Genl., 21 Sup. Ct. Rep. 21, have reaffirmed the right in a case on 'all fours' with this. In that case a statute permitting each stockholder of a corporation to cumulate his votes upon any one or more candidates for directors (Michigan Statutes 1885, ch. 112; Pub. Acts, 1885, p. 116) was held to be within the power reserved by the State Constitution to its Legislature to alter, amend or repeal future acts of incorporation, and therefore does not impair the obligation of the contract made between the State and the corporation by its original organization. The court remarking at the close of the opinion, 'remembering that the Dartmouth College case (which was the cause of the general introduction into the legislation of the several states of a provision reserving the power to alter, amend, or repeal acts of incorporation) concerned the right of a Legislature to make a change in the number and mode of appointment of the trustees or managers of a corporation, we cannot assent to the theory that an express reservation of the general power does not secure to the Legislature the right to exercise it in this respect.' (*Watson Seminary v. County Ct.*, 149 Mo. 67; *Penn College Cases*, 13 Wall. (U. S.) 213; *Miller v. State*, 15 Wall. 478; *Greenwood v. Freight Co.*, 105 U. S. 13; *Cross v. Railroad*, 12 S. E. Rep. 1071; *State v. Person*, 32 N. J. L. 134; *Meadow Dam Co. v. Gray*, 30 Maine 547.)

"It results that the State having reserved the right to alter, amend or repeal the charter or law under which the Granby company was organized, the Constitution of 1875, and statutes in pursuance thereof, allowing the cumulative vote for directors, are not in violation of the Constitution of the United States, and did not impair the contract of the State with said company, because in accepting the charter it gave its assent to such amendment."

In *Gardner vs. Hope Insurance Company*, 9 R. I. 194, the court had under consideration a statute which made stock which was nonassessable under the articles of incorporation and nonassessable under the laws in effect at the time the

charter was granted subject to assessment for the payment of debts of the corporation, In the cited case, at page 199, the court said:

> "The legislature have reserved the power, at any time to alter or repeal the charter, or any of its provisions. The corporators accepted it upon this condition, and agreed that its provisions might be changed, and every purchaser of stock in this company has assented to these terms, and has agreed to hold his shares subject to this liability to change. *There is no limit to the power expressed in the act. In terms it is unlimited.*
>
> "There is no difference between the parties here or their counsel as to the general rule, that the obligation of a contract in favor of or against the corporation or corporators cannot be impaired, nor can a right under the provisions of the charter be discharged or defeated.
>
> *"But it is claimed by the plaintiff, that by the original charter he has a right vested in him to be free from assessment, and he rests this claim upon the provision in the charter, that stockholders shall not be liable to any responsibility beyond the amount of their respective shares. He claims that it was a contract entered into with the corporators, that this liability should not be extended. There is no case among all those cited by the plaintiff which holds such doctrine, and he has not been able to find one which supports it."*

In *Somerville et al. vs. St. Louis M. and M. Company*, 46 Mont. 268, the court had under consideration a statute authorizing the corporation to make its stock assessable by amendment to its charter by two-thirds vote of the stockholders. The appellant, a minority stockholder, challenged this statute on the grounds that it was an impairment of his contract and in violation of Article 1, Section 10 of the Constitution of the United States.

In the cited case, the appellant contended, as appellant

contends here, that the reserve power of the legislature was so reserved in order to avoid the effect of the Dartmouth College case, supra, and that it was limited to an amendment or alteration of the contract in so far as it concerns the relation between the state and the corporation.

The court overruled this contention and held that the reserved clause, which gave the legislature the power to alter or amend the contract, applied to the contract between the stockholder and the state as much as to any other contract contained in the charter. The supreme court of that state, in discussing this question, 46 Montana, at page 275, said:

> "Our conclusion in that case (*Allen vs. Ajax Mining Company*, 30 Mont. 490, 77 Pac. 47) was that the reserved power may be exercised, not only to alter the contract as it exists between the state and the corporate entity, but as well to alter the contract existing between the corporation and its stockholders, and the stockholders inter sese, to the extent that the authority to dispose of all the corporate property. * * * With all due respect to the authorities holding differently, we see no reason for changing our position, and the decision in that case is conclusive against the appellants here, unless a distinction is to be drawn between the facts in that case and this one; for upon a parity of reasoning, if the legislature may confer upon a corporation the authority to dispose of all of its property—a right denied to the corporation at the time it was organized—*it may likewise provide for a change in the limited liability of the stockholders, by authorizing non-assessable stock to be made assessable upon such reasonable terms as the legislature may prescribe.*" (Italics are ours.)

In *Meadow Dam Company v. Gray*, 30 Me. 547, at page 551, the court, in discussing a statute which increased the liability of stockholders said:

"Several objections to a recovery have been made. They are in substance:

* * *

"6. That the additional act, approved on August 10, 1848, increased the liability of the stockholders, and thereby relieved the defendant from the performance of this contract.

"The act of incorporation was accepted, and the subscription was made, with a provision in the act, that it should be subject to all the duties and liabilities imposed upon corporations by the seventy-sixth chapter of the Revised Statutes. *The twenty-third section of that chapter provides, that all acts of incorporation thereafter granted, shall at all times be liable to be amended, altered or repealed at the pleasure of the Legislature. The defendant cannot therefore correctly allege, that his liability has been increased without his consent. He consented to such action of the Legislature by becoming a member of the corporation.*

"It is well settled, that an action can be maintained on an express promise to pay for a share or to pay an assessment upon it, although the share may be liable to be sold, to obtain such payment. Turnpike Corporation v. Adams, 8 Mass. 138; *Turnpike Co. v. Thorp,* 13 Conn. 173; *Glover v. Tuck,* 24 Wend. 153; *Herkimer Co. v. Small,* 21 ib. 273; 2 Hill, 127; *Selma and Tennessee Railroad v. Tipton,* 5 Ala. 787." (Italics are ours.)

In the case of *In re Lee's Bank,* 21 N. Y. 9, the Court had under consideration a statute which made bank stock assessable. Although it was not assessable at the time the corporation was chartered, the court held that such statute did not violate the obligation of the stockholders' contract. The conclusion of the court is found on page 22 of volume 21, New York Reports. This case was appealed to this court and is found reported as *Sherman vs. Smith,* 1 Black 587, 66 U. S. 587, 17 L. Ed. 163. This court affirmed the

opinion of the New York Court of Appeals and in 1 Black at page 593, said:

> "* * * *Now, the 32d section, which reserved to the Legislature the power to alter or repeal the act, by necessary construction, reserved the power to alter or repeal all or any one of these terms and conditions, or rules of liability, prescribed in the act. The articles of association are dependent upon, and become a part of, the law under which the bank was organized, and subject to alteration or repeal, the same as any other part of the general system.*" (Italics are ours.)

This case was followed and cited *McGowen vs. McDonald*, 111 California, 57, where the court at page 66, said:

> "*Under the authority thus conferred both the legislature and the people had power to change the law in regard to the liability of stockholders, without violating any provision of the constitution of the United States.*

> "In *In the Matter of Empire City Bank*, 18 N. Y. 199, a similar question arose. That was a proceeding to enforce a personal liability of stockholders for the debts of the bank under an act passed after the bank was incorporated. The court, by Denio, J., said: 'The statute under which the proceedings were had was challenged as being a violation of the constitution of the United States and of this state. By the federal constitution no state can rightfully enact a law impairing the obligation of contracts. It is argued that, by the general banking law, the associations which it authorizes are alone responsible for its contracts, the shareholders being wholly exempt from liability, and it is insisted that this in the nature of a contract between the state and the shareholders, and that the constitutional guaranty of the integrity of contracts, in the national constitution, would be illusory if the state could, by changing its constitution, subvert all existing engagements; and hence that the guaranty applies as well to state constitutions as to other state laws. Without denying or affirming the soundness of these positions,

it is enough to say that the general banking law expressly reserves to the legislature the power to alter or repeal it, so that any changes, which it or the people think proper to make, are fully authorized by the provisions of the supposed contract itself.' See, also, the following cases, which are to the same effect: *In the Matter of Lee, etc. Bank,* 21 N. Y. 9; *In the Matter of Reciprocity Bank,* 22 N. Y. 9; *Sleeper v. Goodwin,* 67 Wis. 577; *Tomlinson v. Jessup,* 15 Wall. 454; *Meadow Dam Co. v. Gray,* 30 Me. 551." (Italics are ours.)

This case was also cited with approval by this court in *Looker vs. Maynard,* 179 U. S. 46 at page 52 and page 53, where this court speaking through Mr. Justice Gray, said:

"The case of *Sherman v. Smith,* 1 Black. 587, was as follows: The general banking act of New York of 1838, c. 260, provided, in Sec. 15, that any number of persons might associate to establish a bank, upon the terms and conditions, and subject to the liabilities prescribed in this act; in Sec. 23, that no shareholder of any association formed under this act should be individually liable for its debts, unless the articles of association signed by him should declare that the shareholder should be liable; and, *in Sec. 32, that the legislature might at any time alter or repeal this act. The articles of association of a corporation organized under this act in 1844 expressly provided that the shareholders should not be individually liable for its debts.* By provisions of the constitution of New York of 1846, art. 8, sec. 2, and of the general statute of 1849, c. 226, *the shareholders of all banks were made liable for debts contracted by the bank after January 1, 1850. This court unanimously held that these provisions were not unconstitutional as impairing the obligation of a contract.*" (The italics are ours.)

This case was also followed in *In Re Reciprocity Bank,* 22 N. Y. 9, and in *Hinckley vs. Schwartzchild,* 107 N. Y. 470.

In *Greenwood vs. Freight Company,* 105 U. S. 13, at page

20, this court, discussing Mr. Justice Story's suggestion in the Dartmouth College case, said:

> "* * * It was, no doubt, with a view to suggest a method by which the State legislatures could retain in a large measure this important power, without violating the provision of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College case, suggested that when the legislature was enacting a charter for a corporation, *a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation.* And he cites with approval the observations we have already quoted from the case of *Wales v. Stetson,* 2 Mass. 143." (The italics are ours.)

The Greenwood case was cited with approval by this court in *Looker vs. Maynard,* 179 U. S. at page 52.

The Greenwood case, supra, was also cited with approval and quoted by this court in *Citizens Savings Bank vs. Owensboro,* 173 U. S. 636, where this court, speaking through Mr. Justice White, at page 651, said:

> "The source of the reservation, by many of the States in general laws, of the power to amend, alter or repeal was fully reviewed in *Greenwood v. Freight Company,* 105 U. S. 13, where it was shown that such legislation had its origin in the purpose to provide for a case exactly like the one before us. Referring to the decision in *Dartmouth College v. Woodward,* 4 Wheat. 518, the court, through Mr. Justice Miller, said (p. 20): 'It was, no doubt, with a view to suggest a method by which the state legislatures could retain in a large measure this important power,' (the power to repeal or amend,) 'without violating the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the Dart-

mouth College case, suggested that when the legislature was enacting a charter for a corporation, *a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation.* And he cites with approval the observations we have already quoted from the case of *Wales v. Stetson*, 2 Mass. 143. It would seem that the States were not slow to avail themselves of this suggestion. . . .' As then the limitation in the charter of the bank was subject to repeal by the legislature, it cannot be claimed that such exemption was vested in the bank, and was therefore subject to be reinstated if the Hewitt Act was not an irrevocable contract, even if the correctness of the claim that this result would legally arise, if the charter had been an irrevocable contract, be arguendo conceded." (Italics are ours.)

Appellant contends that the reserve power applies only as between the state and the corporation and cites cases to support his contention.

We shall not review at length those cases, but merely point out that in most of them the contract was a private contract as in the case of *St. John vs. Building and Loan Association*, 136 Iowa, 448; or the corporation was not a corporation which had a public duty to perform and in which the public had an interest as opposed to the interests of the stockholders; or such cases as *Gary vs. St. Joe Mining Company*, 34 Utah, 497, or *Yoncalla State Bank vs. Gemmill*, 134 Minn. 334, where the reserved power of the legislature was in no way comparable to the reserve power contained in Section 1090 Code 1873, codified as Section 1619 of the Code of 1897, which were in full force and effect both at the time the appellant bank was orignally incorporated

and at the time it was reincorporated and its charter renewed in 1911.

Appellant also attempts to justify his position and to distinguish those cases which held that the stockholders of a corporation may be made liable for an assessment to pay creditors as contra-distinguished from an assessment to repair impaired capital stock. It is his contention that the assessment to repair impaired capital stock is for the benefit of the corporation only and that the statute challenged herein, Chapter 181 Laws of the Forty-first General Assembly, codified as Section 9248-a1 of the Code of 1927, was enacted for the benefit of the bank.

We respectfully submit that such is not the case, and that the assessment for the purpose of repairing impaired capital stock is in the interest of the public, was passed to protect the public depositors in the bank by maintaining the solvency thereof, and maintaining their deposits in toto and undiminished, and was well within the reserved power reserved to the legislature of the State of Iowa, which took the suggestion of Mr. Justice Story in the Dartmouth College case, and followed it by providing that the legislature should have the power to alter or abridge the articles of incorporation of any corporation organized after its passage whenever the legislature deemed it for the public good.

We believe the language of this court expressed by Mr. Justice Miller in *Greenwood vs. Freight Company, supra,* reiterated by Mr. Justice White in *Citizens Savings Bank vs. Owensboro, supra,* and again expressed by Mr. Justice Gray in *Looker vs. Maynard, supra,* that the power to alter or amend the articles of incorporation of a corporation became as much a part of the stockholder's contract as any

other provisions of the articles of incorporation of the laws, and that being a part of the contract, the exercise of the power to amend, alter or abridge the articles of incorporation cannot be a violation of the obligation of the contract in violation of Section 1, Article 10 of the Constitution of the United States and that if it is not in violation of that section, that it cannot deprive the appellant stockholder of his property without due process of law because he agreed in his contract that the legislature of the State of Iowa, being one of the contracting parties, could so change the obligation thereof.

That a bank is a corporation of such a public nature as to warrant the exercise of such power is discussed in the next division of the argument.

III

The business of banking is a business of such public nature and public interest that it may be brought under complete legislative control and regulation by such timely action as in the judgment and discretion of the legislature is necessary for the public good, and the protection of the public, which deals with the bank, and such action is not an impairment of the obligation of the stockholder's contract with the state, nor denying him of his property without due process of law.

A banking corporation is a corporation doing a business which is not private, only, but is of great importance and interest to the public. This is especially true in the State of Iowa for the reason that, regardless of how much the capital stock may be, there is no limitation upon the amount of deposits which a bank may take, either of private individ-

uals or of public corporations, such as, Counties, School Districts, Cities and Towns and Townships. It is of highest importance to the public that a bank may be maintained in a solvent condition and that any impairment in its capital stock be made good by the stockholders, in order to maintain that solvency which makes it a safe institution for the money of the depositors and with which the public in general can deal. The legislative control power of the Iowa Statutes, herein before referred to, specifically provides that the Articles of Incorporation may be altered or abridged by the legislature whenever the legislature deem it necessary for the public good. The reserve power to thus amend, alter or abridge, is not limited to questions arising out of the privilege of the franchise, but extends especially to those cases where, for the protection of the public and for the public good, the legislature may act.

This question has been before many courts in various jurisdictions of these United States and has been the subject of discussion of this honorable court.

In the case of *Bryan et al. v. Bullock,* 84 Florida, 179 at 191, the Supreme Court of Florida, with reference to the nature of the business said:

> "At common law the business of banking was open to all and could be followed by the citizen at pleasure, unless forbidden by legislative enactment, *but the business is not juris privati only, it is subject to public regulation because affected with a public interest.*" (Italics are ours.)

In *Davis v. Moore,* 130, Arkansas 128 at page 138, the Supreme Court of that State, discussing similar statute imposing liability on the stockholders of the bank said:

"It cannot be assumed that the new terms prescribed by the statute operate as an impairment or depreciation of the value of the stock, and that an objecting stockholder would be unable to dispose of his shares of stock at full value. *The statute is reasonable and just alike to the public and to stockholders in banking corporations, and for that reason, if for no other, it can not be assumed that the imposition of new methods of business and new terms upon which a corporation may operate business would depreciate the market value of stock in such corporation.*

"It is evident, we think, that the Legislature intended to give a retroactive effect to this statute so as to make it apply to all banking corporations which continue in business. We do not ignore the well-known presumption against giving, by implication, a retrospective effect to statutes. The rule is, we know, that every statute is presumed to have been intended to act prospectively unless otherwise expressed, but when this statute is considered as a whole, *it is obvious that the Legislature intended to impose liability for all the indebtedness of a bank whether it accrued prior to the time the act went into force or thereafter. It is difficult to separate the obligations of a going business concern like a bank.* Of course, after it becomes insolvent it would be possible for the Bank Commissioner to ascertain and separate the obligations of the bank which accrued subsequent to a certain date and impose the statutory liability against stockholders only as to such indebtedness. But that would not be the convenient or orderly method of winding up the affairs of such a corporation and applying its assets ratably among the creditors. The statutory scheme would not, we think, be complete and efficacious unless construed to impose liability on the stockholders for its debts irrespective of the time when contracted, and this affords a strong reason for construing the statute as operating retroactively. At any rate, the statute declares that stockholders of 'every bank doing business in this State'—that is to say, all who did business in the State after the statute went into effect—'shall be liable for all contracts, debts and engagements of such bank' to the extent of their stock,

etc., and the clear inference from this language is that from and after the period stated the stockholders should be liable for all debts of the bank whether contracted before or after that time.

"Our conclusion, therefore, is that the statute applies retroactively, and that as such it is not in conflict with the Constitution of this State or of the United States." (Italics are ours.)

The last cited case was quoted with approval in the case of *Bank v. State*, 148, Arkansas, 504, where the court at page 510 said:

"An acceptance of the altered charter was clearly made by continuation in business after the change was made. The statute in question is not void as infringing upon either the Constitution of the State or of the United States." (Italics are ours.)

In the case of *Allen vs. Scott*, 104 Ohio State 436, at 440, the court, speaking through Mr. Chief Justice Marshall, discussing a similar legislative control section, cited the opinions of this court in *Greenwood vs. Union Freight Company*, supra, and quoted from *Looker vs. Maynard*, 179 U. S. 46 at page 53, saying:

"The case of *Sherman v. Smith*, 1 Black, 587, was as follows: The general banking act of New York of 1838, c. 260 provided, in Sec. 15, that any number of persons might associate to establish a bank, upon the terms and conditions, and subject to the liabilities prescribed in this act; in Sec. 23, that no shareholder of any association formed under this act should be individually liable for its debts, unless the articles of association signed by him should declare that the shareholder should be liable; and, in Sec. 32, that the legislature might at any time alter or repeal this act. The articles of association of a corporation organized under this act in 1844 expressly provided that the shareholders should not be

individually liable for its debts. By provisions of the constitution of New York of 1846, art. 8, sec. 2, and of the general statute of 1849, c. 226, and the shareholders of all banks were made liable for debts contracted by the bank after January 1, 1850. *This court unanimously held that these provisions were not unconstitutional as impairing the obligation of a contract.*" (The italics are ours.)

In the case of *Northwestern Trust Company vs. Bradbury*, 117 Minn., 83, 134 N. W. 513, the court said (quoting from 134 N. W. at page 515):

> "*The business of banking so materially and vitally affects the general public interests as to make it a proper subject for complete legislative regulation and control. The sole purpose of this statute was to vest in the public examiner supervisory control over such institutions and by timely action to prevent the impairment of their funds, to the injury and loss of depositors and others, and to keep and maintain them so far as practicable upon a safe and sound financial basis.* That the power to so provide is within legislative discretion we have no doubt. *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062." (Italics are ours.)

This authority was cited with approval in the case of *Duke vs. Force*, 120 Washington 599 at 611.

In the thus cited opinion, this court speaking through Mr. Justice Holmes, 219 U. S. at page 113 said:

> "* * * We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. On the contrary we are of the opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature de-

clares by implication that free banking is a public danger, and that incorporation, inspection and the above-described co-operation are necessary safeguards, this court certainly cannot say that it is wrong. (Citing cases.)"

In the cited case and in all of the so-called bank guaranty cases determined by this Honorable Court, it has been uniformly held that such laws requiring an assessment upon banks for the purpose of guaranteeing the solvency of all banks under the control of the state are of such public interest that they do not violate either the obligation of contract or the due process clause of the Fourteenth Amendment of the Constitution of the United States.

In the last cited case, this court also said:

"* * * If then the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. *Even the primary object of the required assessment is not a private benefit as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand.*" (The italics are ours.)

In the last cited case, it must be borne in mind that it was decided under the police power of the state. The case at bar is far stronger because of the fact that the statutes were passed providing for the assessment to repair impaired capital stock and keep and maintain the solvent condition of the bank and are under an expressed reserved power to alter or amend the articles of incorporation whenever the legislature deem it necessary for the public good.

The State of Iowa, speaking through the legislature, being one of the parties to the contract and having reserved unto itself the power and authority to alter or abridge the contract, has said to the stockholder, the other contracting party, that, in the public interest, the stockholder must, to the extent of the amount of stock held by him, assist in maintaining the solvency of the bank.

How can the stockholder complain that the obligation of his contract is impaired when he agreed in advance that this could be done when the legislature deemed it necessary for the public good?

We repeat the language of Mr. Justice White in *Citizens Savings Bank vs. Owensboro*, 173 U. S. 636, where this court at page 562, said:

> "A provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the *subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation.*" (Italics are ours.)

Any other construction would render the reserved power of the legislature useless, void, and impotent, and would make the suggestion of Mr. Justice Story in the Dartmouth College case, and the subsequent action of the legislatures of the various states, and the numerous opinions of the courts rendered thereon entirely nugatory. Any other construction would make the reservation entirely valueless and would result in an impossibility of its operation.

This court, speaking through Mr. Justice White in *Citizens Savings Bank vs. Owensboro*, 173 U. S. 636, at 651, with reference to this proposition said:

"• • • Indeed, reduced to its final analysis, the argument that because in a grant or charter at a time is designated for its duration, it cannot, therefore, until the expiration of such time, be repealed, altered or amended, is equivalent to saying that the reserved power cannot be exercised in any case of contract. *For, if every case of charter or grant where a time is fixed, either expressly or by necessary construction in the charter or grant, is taken out of the reach of the reserved power, it would follow that only those charters or grants which were determinable at will would come under the control of the power reserved. But to say this simply amounts to declaring that the reserved power applies and can be enforced only in those cases where it would be entirely unnecessary or useless to do so.*"

We respectfully submit that the courts should not place such a construction upon the statutes of a state that their enactment will be rendered entirely and absolutely nugatory.

IV and V

Even though the reserved power, hereinbefore discussed, does not apply, the opinion of the Supreme Court of Iowa in the case at bar was correct for the reason that no additional liability was imposed upon the appellant; such liability already existing under statutes in effect at the time of the reincorporation in 1911; AND CHAPTER 181, LAWS 41ST GENERAL ASSEMBLY, PROVIDED MERELY FOR AN ADDITIONAL REMEDY FOR COLLECTING THAT EXISTING ASSESSMENT LIABILITY.

The Supreme Court of the State of Iowa held that the statutes at the time the appellant became a stockholder in the bank, under its reincorporation and renewed charter in 1911, imposed upon the stockholder a liability to pay the assessment for which the judgment is sought in this case. Those statutes effective on May 6, 1894, enacted

by Chapter 29, Laws of the Twenty-fifth General Assembly and codified as sections 1878, and 1879, Code of Iowa 1897, and as Sections 9246, 9247 and 9248 of the Code of Iowa, 1924, provided as follows:

"9246. Impairment of capital stock—assessments. Should the capital stock of any state or savings bank become impaired by losses or otherwise, *the superintendent of banking may require an assessment upon the stockholders*, and shall address an order to the several members of the board of directors of such bank, fixing the amount of assessment required.

"9247. Compliance with order. *The board of directors shall*, within thirty days after the receipt of such order, *cause such deficiency to be made good by a ratable assessment upon the stockholders* for the amount of stock held by them, by giving such stockholders notice in writing, signed by the president or vice president, attested by the cashier or secretary of the bank, under its seal, if it have one, and deposited in the post office, addressed to the last known residence of the stockholders, proof thereof to be made by the affidavit of the person so making the deposit, which notice shall state the entire sum to be raised, and the amount due from the addressed stockholder.

"9248. Assessment enforced. *Should any stockholder neglect or refuse to pay his assessment* within ninety days from the date of mailing notice thereof, the board of directors shall cause a sufficient amount of the capital stock held by such stockholder to be sold at public auction to make good the deficiency, after giving thirty days' notice thereof by posting the same in the bank, and publishing it in some newspaper of the county in which the bank is located, which notice shall recite the assessment made, *the amount due thereunder from the stockholder*, and the time and place of sale; proof of all which may be made in the manner provided in the preceding section." (Italics are ours.)

It should be noted that the assessment is "*upon the stock-*

holders" made under the order of the superintendent of banking, and under the order of the board of directors. It should also be noted that the statute provides that if *"the stockholder neglects or refuses to pay his assessment"* that the remedy by the sale of his stock is prescribed. The notice of sale must *"recite the assessment* (and) *the amount due thereunder from the stockholder."*

The enactment which is challenged in this suit, and which it is claimed by the appellant is in violation of the obligations of his contract, and in violation of due process of law, merely provides for another remedy of collecting the assessment, which was imposed under the statutes in effect at the time of the reincorporation and renewal of the charter in 1911, and which was a part of the stockholder's contract with the state. No additional liability is imposed upon him by the said enactment.

The challenged enactment is only Chapter 181 Laws of the Forty-first General Assembly of Iowa, and codified as Section 9248-a1 Code of Iowa 1927 and provides as follows:

> "Liability for deficiency. Should the proceeds of a sale under the preceding section of all of the stock of any stockholder *be insufficient to satisfy his entire assessment liability* he shall be personally liable for the deficiency, which may be collected by suit brought in the name of the bank against such stockholder." (Italics are ours."

The remedy by the sale of the stock was not made exclusive by the legislature, and there is not one syllable in the above quoted sections of the original statute to indicate that such remedy was exclusive. The stockholder's contract with the state under the statute as it existed prior to the enactment of the last cited section was that the superintendent of banking

could require an assessment "upon the stockholders;" that the board of directors under the mandate of the superintendent of banking, were required to make the deficiency good by a "ratable assessment upon the stockholders;" that should any stockholder neglect or refuse to pay "his assessment" within a specified time the board of directors should order "a sufficient amount of the capital stock held by such stockholder" sold after giving prescribed notice which must "recite the assessment made" and "the amount due thereunder from the stockholder."

The appellant contends that the supreme court of Iowa, erred in holding that the first above quoted statutes imposed a liability on the stockholder prior to the enactment of Chapter 181 Laws of the Forty-first General Assembly, effective in 1925.

While the construction placed on this statute by the Supreme Court of Iowa is not binding on this court, it is the rule of this court laid down by Mr. Justice Peckham in *Waggoner vs. Flack*, 188 U. S. 595, that this court will follow the construction of a particular statute of a state by the Supreme Court of that state if the construction is not free from doubt. The language of Mr. Justice Peckham in the cited case at page 600 is as follows:

> "We are not therefore, bound by the construction which the state court places upon the statutes of the state, which are involved in such an inquiry (question of impairment of an original contract by subsequent legislature), *yet, as the true construction of the particular statute is not free from doubt, considering the former legislation of the state on the same subject, we feel that we shall best perform our duty in such case by following the decision of the state court on the precise question, although doubts as to its correctness may have*

been uttered by the same court in some subsequent case." (Italics are ours.)

Appellant contends that the Supreme Court of Iowa has, in former cases, held that there is no personal liability on the stockholder under the statutes as they existed prior to 1925, and cites *Leach vs. Arthur Savings Bank,* 203 Iowa 1052, 213 N. W. 772, and *Andrew vs. Peoples State Bank of Humboldt,* 234 N. W. 542 at 546.

In our argument before the Supreme Court of Iowa in the case at bar, we stated that we were not unmindful of the holdings in the Arthur Savings Bank case; but pointed out to the court that the question involved in the instant case was not raised in the Arthur Savings Bank case, supra, nor was it raised in the Peoples State Bank case, supra, for the reason that the question involved in those cases was the question of the right of a stockholder to apply an assessment which he had paid prior to the closing of the bank, on his liability to creditors after the bank closed. What the court said, therefore, in the cited cases, was mere dictum and was not followed by the Supreme Court of Iowa when the precise question was raised in the instant case.

The sole question involved under this division of the argument is whether the statutes above cited and in effect prior to the enactment of Chapter 181, Laws of the Forty-first General Assembly of Iowa, created a liability upon the stockholder for the assessment ordered by the Superintendent of Banking and whether the later enactment created an additional liability upon the appellant.

The rule that courts will look to the intent of the legislative branch of government in construing statutes is too well established to require citation of authority to this

court. As well established is the rule that the courts may look to the title of an act as an aid in determining the intent of the legislature in enacting it.

In Lewis' Sutherland on Statutory Construction, Second Edition, Vol. 2, Section 340, that authority says:

> "But the title of an act is now so associated with it in the process of legislation that when, in performing its constitutional functions, it affords means of determining the legislative intent, in cases of doubt its help cannot be rejected for being extrinsic and extra-legislative. The language of an act should be construed in view of its title and its lawful purposes; broad langauge should be confined to lawful objects."

The Supreme Court of Kentucky in speaking of the title of an act, says:

> "It is essentially a part of the act, not only because it has been selected and adopted by the legislature as one of the tests of their meaning as expressed in the bill, but because the constitution has made it a part, and the controlling part, of the law to which it applies. It is therefore, not only useful in affording a fair index of the legislative intent, in case of ambiguity in the context, but it must be read in connection with the remainder of the act, as a part of it, in determining what is the law."

See *Commonwealth vs. Barney*, 24 Ky. L. R. 2352.

In Story's Commentaries on the Constitution, Section 459, it is said:

> "It's true office is to expound powers conferred, not substantially to create them."

It is further said in Lewis' Sutherland on Statutory Construction, Vol. 2, 2d. ed. section 341:

> "It is 'a good means' says Lord Coke, 'to find out the meaning of the statute, and is a true key to open the understanding thereof.'" Citing Co. Litt. Section 79a.

Using such aids to ascertain the legislative intent and purpose of these enactments, let us look to the title of these acts as they were passed by the legislature.

The statutes providing for the assessment on the order of the superintendent of banking, effective May 6, 1894, being Chapter 29 Laws of the Twenty-fifth General Assembly, and codified as hereinbefore stated, bore the following title:

> "An act to provide for the better security of depositors in state and savings banks organized under the laws of Iowa."

To show the urgency of the legislation at that time, (which was during a financial crisis) the act was made effective by publication and became effective on May 6, 1894, having been approved by the Governor on April 24, 1894.

That the legislature intended a liability on the stockholder is shown by the fact that the act then provided for an assessment "upon the stockholders" and provided that should "any stockholder" in any state or savings bank organized under the laws of this state "neglect or refuse to pay his assessment" that it should be the duty of the board of directors "to cause a sufficient amount of the capital stock held by him" to be sold to pay the same.

It is therefore evident that the purpose of this act was, not to benefit the corporation, but to provide for the better security of the depositors in state and savings banks in Iowa, and, that the legislature, in enacting this statute, expected the remedy to be sufficient is shown by the fact that the board of directors was authorized "to cause a sufficient amount of the capital stock" to be sold, and not his entire holdings.

As further evidence of the existing liability, it must be noted that in the original act, Chapter 29, Laws of the Twenty-fifth General Assembly, the notice of sale of stock must apprise the stockholder of *"the assessment made* (and) *the amount due thereunder from the stockholder."*

How could it be "due from the stockholder" if it were not the intent of the legislature to make the stockholder liable for the assessment?

Having thus imposed a liability upon the stockholder, provided for a method of apprising him of the amount due from him thereunder, and for sale of his stock if he neglected or refused to pay his assessment, no further legislation was enacted upon this subject until the Forty-first General Assembly of Iowa, which met in 1925. It is common knowledge that at that time another financial crisis was in existence affecting the solvency of banks. The former general assembly had evidently considered that the sale of a sufficient amount of the capital stock of each stockholder would be sufficient to again place the bank in a solvent condition. Evidently, the Forty-first General Assembly found reason for further legislation upon the subject and proceeded to amend Section 9248 of the Code by the enactment of Chapter 181 of the laws thereof.

Let us consider the title to this act which was as follows:

> "An act to amend Section ninety-two hundred forty-eight of the Code of 1924, *relating to the collection of assessments against stockholders of banks.*" (Italics are ours.)

Thus the construction placed upon this statute by the Supreme Court of Iowa was entirely in accord with the intent of the legislature which was in the first instance in the enactment of Chapter 29, Laws of the Twenty-fifth General Assembly, to provide for better security of depositors in state and savings banks, and in enacting Chapter 181 Laws of the Forty-first General Assembly (herein challenged) to amend the former enactment relating to the collection of assessments against stockholders of banks.

It should also be noted that the said Chapter 181, herein challenged, provides that liability for the deficiency after the sale of the stock is effective only where *"the proceeds of a sale hereunder (section 9248) of all of the stock of any stockholder be insufficient to satisfy his entire assessment liability."*

The very construction placed upon the act by the legislature shows on its face, as well as by the title, that the legislature intended to fix an assessment liability prior to the enactment of said Chapter 181. The legislature recognized that the liability for the deficiency had always existed by its expression "his entire assessment liability," and the provision for recovery by personal judgment is merely an enlargement of the remedy against him. In the first instance the recovery may be had against the stock and the proceeds applied to his liability by notice only. If this is not sufficient to satisfy "his entire assessment liability,"

then judgment and general execution against his other property may be had.

It was, therefore, the intent of the legislature in the enactment of the original statute to make the stockholder liable for the assessment, and in the enactment of the latter statute to provide a more effective remedy for the collection of the liability which already existed.

It is respectfully submitted that the Supreme Court of the State of Iowa, upon all of the authorities cited, did not err in holding that under the statutes of the State of Iowa, existing at the time of the reincorporation and renewal of the charter of the appellee bank, did provide for, prescribe, and impose a liability on the stockholders, in banks including the appellant, for the payment of an assessment to repair impaired capital stock equal to the amount of stock held by them, and that the subsequent change in remedy providing for judgment and general execution against him, was remedial only, and therefore, not an impairment of the obligation of his contract nor a denial of due process of law.

It is contended by appellant that there is a distinction between the cases providing for the enforcement of the liability for the benefit of creditors and in the enforcement of a liability to repair impaired capital stock. We have pointed out the intent of the legislature as evidenced by the title of the original act of the Twenty-fifth General Assembly and of the amendatory act of the Forty-first General Assembly which is evidenced by the titles to the act in question, the former to protect by assessment upon the stockholders, the depositors in banks, a public responsibility; and the latter to provide a more effective remedy or means of collecting the liability.

In *Bernheimer vs. Converse* supra, this court speaking through Mr. Justice Peckham (206 U. S. 532-3) said:

> "Nor can we see any substantial difference in this respect between a liability to be ascertained for the benefit of creditors upon a stock subscription and the liability for the same purpose which is entailed by becoming a member of a corporation through the purchase of stock, whereby a contract is implied in favor of creditors. *The object of the enforcement of both liabilities is for the benefit of creditors, and while it is true that one promise is directly to the corporation and the other does not belong to the corporation, but is for the benefit of its creditors, either liability may be enforced through a receiver acting for the benefit of creditors, under the orders of a court in winding up the corporation in case of its insolvency.*" (Italics are ours.)

In many jurisdictions in these United States, and in the opinions of this court, statutes relating to a change of remedy have been held not in violation of the impairment of obligations of the contract or due process clauses of the Constitution of the United States.

In *Brotherhood of American Yeoman vs. Mantz*, 23 Arizona, 610, the Supreme Court of that state had under consideration a statute relating to defenses based on misrepresentation in suits on life insurance policies.

In discussing this question, the Supreme Court of that state at page 616, said:

> "Section 2 of chapter 46, we think, was purely remedial. It imposed a duty upon an insurer, in case it was sued on one of its policies to pay or tender to the insured any premiums that it had received, before it could defend. It was intended to be regulatory of litigation over policies of life insurance. *We understand the rule to be that parties have no vested right in par-*

ticular remedies or modes of procedure, and that legislatures may change existing remedies or prescribe new modes of procedure without impairing the obligation of the contracts, provided an efficacious remedy remains for its enforcement. *National Security Co. v Architectural Decorating Co.*, 226 U. S. 276, 57 L. Ed. 221, 33 Sup. Ct. Rep. 17 (see, also, Rose's U. S. Notes); In re Farmers' Co-operative Co. (D. C.), 202 Fed. 1008; *American Radiator Co. v. American Bonding Co.*, 27 Cal. App. 687, 151 Pac. 168. It was therefore not necessary that the defendant deposit with the court the premiums it had received from the insured before it might defend, and the plaintiff's contention in that respect is not well founded, because chapter 46 was repealed in 1913 when the laws were revised, and since that time it has not been necessary to observe the remedial part thereof in litigation over life insurance policies, even though they may have been written while chapter 46 was a valid and subsisting law." (Italics are ours.)

In *Moore vs. Ripley*, 106 Ga. 556, the Court had under consideration a statute which provided that each stockholder in a bank shall be individually liable up to a limited amount for the ultimate payment of the debts of the corporation. There was no provision in the statute for the enforcement of that liability. A later enactment provided a remedy and the defendant stockholders resisted recovery on the grounds that the latter statute was unconstitutional in that it imposed an additional liability on them but the Court held the act merely remedial.

The Court, speaking through Mr. Justice Little, at page 559, said:

"2. The point is also made by the demurrer, that as the liability set out in the petition is purely statutory, the right of action is directly in the creditors, and the receiver had no right to institute the action. The act

incorporating the State Savings Association, which fixes the liability of its stockholders, does so in the following language: 'Each stockholder shall be individually liable for the ultimate payment of the debts of said corporation to an amount equal to the amount of stock held by him.' Acts 1888, p. 82, sec. 5. The statute is silent as to who shall have the right to enforce this liability, in words. It simply fixes the liability. In a number of the States, the statute on this subject goes further and prescribes in terms that the creditors have the right to enforce it for their benefit. It suffices us, however, to observe that our statute prescribes the liability, which is for the ultimate payment of the debts of the corporation in proportion to the number of shares held; and while we are not prepared to say that a single creditor or a number of creditors of the bank could not, under this, maintain an action against a stockholder who is liable, at the same time we know of no reason why a receiver of the corporation, charged with the duty of collecting whatever assets properly belong to the corporation which are liable for the payment of its debts, might not in equity, under this statute, seek and have a decree against all such stockholders for the benefit of all the creditors, inasmuch as the court has taken possession of the estate of the corporation on the application, and for the benefit, of its creditors, and the receiver is but the active officer of the court to collect the assets and apply their proceeds to the extinguishment of the debts due by the corporation. True, the liability fixed by the act of incorporation is not to the corporation itself, but to its creditors; and while all the property of the corporation, including debts due to it, is a fund which goes into the hands of the receiver for the benefit of the creditors, and if, as is true, the liability of the stockholders can only be applied to the extinguishment of debts, and it exists in favor of the creditors, it would seem to be in consonance with equity practice to gather in all the funds made available by law for payment of the creditors and then complete the whole matter by distribution. But, however this may be, our Civil Code No. 1890, provides that this individual liability is an asset of the corporation and shall be enforced by the receiver or other officer having the legal right to collect

and distribute the assets of the failed corporation. The provisions of this statute seem to settle the question. They are codified from the act of 1894. Acts 1894, p. 76. *It is, however, objected that inasmuch as this act was passed subsequently to the act incorporating the bank, in which latter act the liability of stockholders is fixed, to apply it in this case would give to the act of 1894 a retroactive application. This contention is not sound. The act of 1888 created a liability on the part of stockholders for the ultimate payment of the debts of the corporation to an amount equal to the amount of stock held by each, and to apply the act of 1894 would not be in any way to increase or change the liability fixed by the act of incorporation.* The vested right given to the creditors of the bank by the latter act was to hold the stockholder liable for his debt in the proportion named. *This is not taken away nor affected by the act of 1894, but that act recognizes the same liability and simply declares a remedy or means of enforcement of the right given. While the act declares the liability to be an asset of the bank, it does so in the sense of providing for the enforcement of the right previously given, and for the purpose of distributing the proceeds arising from the liability among the persons entitled to it by the act of incorporation. It must, therefore, be a remedial act, and as such has direct application in this case.* By its provisions no injustice is worked to the creditor, nor are any of the rights of that class lessened. It is provided by our Civil Code, No. 6, that laws looking to the remedy or mode of trial may apply to contracts entered into prior to their passage. Such a construction does not contravene the provisions of our constitution. Civil Code No. 5731, Sedgwick on Construction of Statutes, 160; *Pritchard v. Savannah R. Co.*, 87 Ga. 294." (Italics are ours.)

This case was cited with approval in *LaMar vs. Taylor*, 141 Ga. 227, where the Court at page 235, said:

"It was next contended that, if the act of 1894 applied to the statutory liability of the stockholders in this bank, it was unconstitutional as being retroactive and impair-

ing the obligation of contracts. *In Moore v. Ripley, 106 Ga. 556 (32 S. E. 647), the decision substantially disposes of this contention, holding that the provision of the act of 1894 for the enforcement of the liability by the receiver was remedial in its character, and not unconstitutional as being retroactive. As already mentioned, the extent of the liability of the stockholders was in no way changed by that act, but only the method of collecting and distributing to the proper parties the amount for which the stockholders are liable, in accordance with equitable methods.*" (Italics are ours.)

In *Johnson vs. Libby*, 111 Me. 204, 88A 647, the Supreme Court of that state, held that it was immaterial whether the stockholder were a shareholder before the amendment making shareholders liable for the indebtednsss of the corporation, or not for the reason that by continuing as such stockholder she accept[illegible] the effect of the amendment so far as it applied to her l[illegible]lity; and also that a stockholder in a corporation has no vested right in a particular remedy by which his liability as such may be enforced against him.

Under the weight of this opinion, the applicant stockholder by continuing as a stockholder subsequent to the effective date of the statute herein challenged, accepted the amendment and cannot prevail in this case for that reason, in addition to all of the other reasons urged.

The Supreme Court of Iowa in the case at bar also quoted from the last cited case (236 N. W. at p. 13) as follows:

"Its (the amendment to a statute) only purpose and effect was to provide a different remedy, a different course of procedure, by which the shareholders' liability could be enforced. The Legislature has power to modify or change a remedy, provided no substantial right is thereby impaired. *And a shareholder in a corporation has no vested right in a particular remedy by which*

his liability as such may be enforced against him. (The italics are ours.) A change of remedy, whereby no substantial right is affected, is not obnoxious to the fundamental law which forbids the impairment of contracts."

In *Lynch vs. Jacobson*, 55 Utah 129, at 137, the Supreme Court of that state, discussing a statute providing for an assessment to repair impaired capital stock by the secretary of state at page 137, said:

"The method of procedure to enforce the liability may be changed by the Legislature if such change does not enlarge or affect the liability of the stockholder in case the Constitution, as before stated, does not provide a method of procedure. *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105; *Miners' Bank v. Snyder*, 100 Md. 57, 59 Atl. 707, 68 L. R. A. 312, 108 Am. St. Rep. 390; *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; *Henley v. Myers*, 215 U. S. 373, 30 Sup. Ct. 148, 54 L. Ed. 240."

In *Hill vs. Merchants Insurance Company*, 134 U. S. 515, this Court had under consideration a statute of the State of Missouri which provided for an enlarged execution against stockholders in insurance companies to recover alleged liability on stock subscription contracts; it being the contention of the appellant stockholder that inasmuch as neither the charter nor the contract provided for the enlarged execution at the time of his becoming a stockholder, that such statute was in violation of the obligation of his contract because of that fact. In overruling the contention of the appellant stockholder, this Court, speaking through Mr. Justice Harlan (134 U. S. at page 525), said:

134 U. S. Reps. 515 at 525.

* * * "The result of this construction of the charter of the insurance company is, that prior to the passage of the act of 1866, which took effect March 19, 1866,

no specific remedy was prescribed for creditors seeking to reach the unpaid subscriptions of stockholders. But it was open to them to proceed by a suit in equity. That such a remedy could be used without violating any provision of the company's charter, or any right of a stockholder, cannot be doubted. *But neither the company nor its stockholders had any vested right in that particular remedy.* They could only insist that the extent of their liability should not be increased. *The act of 1866 authorized an execution to be issued against a stockholder 'to an extent equal in amount to the amount of stock by him or her owned together with any amount unpaid thereon,' where no property or effects of the corporation could be found. This statute, if given a retrospective operation, certainly did increase the liability of those who became stockholders in the Excelsior Insurance Company prior to its passage.* But the defendant in error contends that it was applicable to all who, like Hill, became stockholders after its passage. Waiving any consideration of this question it is certain that the act of 1879, under which this action was instituted, did not increase Hill's liability. He was liable, by virtue of his original subscription and by his notes to the company, to pay the whole amount of his subscription. *The statute of 1879 did not enlarge this liability, for it authorized an execution against a stockholder, where there was no corporate property to be levied on, only 'to the extent of the amount of the unpaid balance of such stock by him or her owned.' While, under the original charter of the company, he was liable to a suit in equity, under the statute of 1879 he was liable to be proceeded against by notice and motion in the action in which judgment was rendered against the corporation. In either mode he had opportunity to make defense."* (Italics are ours.)

A well reasoned case on this subject is *Waggoner vs. Flack*, 188 U. S. 595. The question involved in the cited case was the constitutionality of a statute which provided for a change of remedy by a state in the forfeiture of lands sold by the state to individuals. The statute challenged in that

case provided for a declaration of forfeiture by the act of the commissioner, whereas the statute in effect at the time the contract was entered into, provided a remedy by resort to judicial proceedings for enforcing forfeiture.

This Court, speaking again through Mr. Justice Peckham (188 U. S. at page 601), said:

"We come, then, to the question of what was the contract, and whether it has been impaired by virtue of the enactment of the statute of 1897, under which the forfeiture has been enforced? Although not material it may yet be observed that the act of 1897 is not the first act which was passed subsequently to the act of 1885, reinstating the provisions for a forfeiture. By section 11 of the act of 1887, Laws, 1887, pp. 83, 86, provision was again made for forfeiting the lands on non-payment of moneys due, and the same was continued by section 11 of the Laws of Texas of 1895, pp. 63, 67.

"*We assume that, at the time these lands were purchased by Phillips, no statute existed providing for forfeiture by entry on the books of the state commissioner of the general land office, and it is admitted that only by virtue of the act of 1897 can the State now claim the right to forfeit the lands by an entry to that effect on the account kept with the purchaser, because of the failure to pay the interest since 1893. The plaintiff in error asserts that the statute of 1897, reinstating or providing for the right of the State to thus forfeit the lands for non-payment of moneys due by the purchaser of land, is an impairment of the contract created between the State and Phillips at the time his application for the land was granted by the state authorities;* and the plaintiff in error asserts he has succeeded to all the rights of Phillips, and this is not denied.

"We must first decide what were the obligations of the contract which was created by the granting of Phillips' application for the purchase of this land and the taking of his notes therefor. The Laws of Texas of 1883, chapter 58, as amended by chapter 12, page 13, Laws of 1885, furnished the evidence of the obligations

of the contract. By those acts it was made the duty of the commissioner of the general land office, after an application for a grant of land has been made and approved, to issue a patent to the purchaser or his assigns, etc., upon payment of all the purchase money and interest upon notes given for the purchase of the land, and provision was made for the giving of the notes or other evidences of the obligation of the purchaser to pay for the land. *His obligation was to pay these notes as they matured. The obligation of the State was to give the patent as mentioned. What particular remedy then existed by which the State might enforce the obligation of the contract made by the purchaser is not material in this aspect of the case.* It is true that the remedy for the enforcement of a contract sometimes enters into the contract itself, but that is where an endeavor has been made to so change the existing remedy that there is no effective and enforceable one left, or the remedy is so far impaired that the party desirous of enforcing the contract is left practically without any efficient means of doing so; but in the case of an alteration of a remedy, if one is left or provided which is fairly sufficient, the obligations of a contract are not impaired, although the remedies existing at the time it was entered into are taken away.

"It appears in the record that the plaintiff in error, or those he represents, failed for years to comply with the obligations of the contract, and failed to pay the interest as it became due, as they promised, and hence the contract was violated.

"The question, then, is, what is the remedy against the party who has broken the contract? The statute of 1897 is turned to for the authority to take possession of the land, the right to keep which the plaintiff in error had ceased to retain because of his failure to do that upon which such right was founded.

"The plaintiff in error, however, says to the State, you cannot avail yourself of the remedy provided by the act of 1897, because it did not exist when I purchased the land, and you then contracted not to create any such remedy against me, and the evidence of the contract is

to be found in the statute of February 23, 1885, which was in force when I purchased. But the answer is that, although at the time Phillips purchased the land a statute had taken away the remedy by way of forfeiture, as therein stated, yet the act taking away the remedy did not constitute a contract on the part of the State with all who purchased lands from it at that time, that it would never pass any other act by which the State might be empowered through its agents to forfeit the lands and take possession thereof by virtue of such forfeiture. The act of February 23, 1885, was a mere enactment, declaring the law to be as therein stated, upon the subject of a remedy for a violation by a purchaser of the obligations of his contract, and it did not assume to bind the hands of any future legislature that might think proper to deal with the subject. *There was no promise or contract expressed in the statute that the State would not enlarge the remedy or grant another on account of the purchaser's violation of his contract, and we think no such contract is to be implied.*

"A purchaser of lands at the time Phillips purchased had no right to assume that the State would not alter the law in the future so far as to give it another and better or a quicker remedy for a violation of his contract by the purchaser, than existed at the time the purchase was made. *To enact laws providing remedies for a violation of contracts, to alter or enlarge those remedies from time to time as to the legislature may seem appropriate, is an exercise of sovereignty, and it cannot be supposed that the State in a case like this, contracts in a public act of its legislature, to limit its power in the future, even if it could do so, with or without consideration, unless the language of the act is so absolutely plain and unambiguous as to leave no room for doubt that its true meaning amounts to a contract by it to part with its power to increase the effectiveness of existing remedies as against those who purchase lands while the act remains alive. No such language is to be found in the act in question, and none ought to be implied.*

"We cannot discern the difference in principle between this case and that of *Wilson v. Standefer,* 184

U. S. 399, which involved a portion of this same legislation. In that case the lands were purchased under the act of 1879, which provided (Sec. 12) for a forfeiture after judicial inquiry determining the failure of the purchaser to pay the annual installments of interest as they became due. Subsequently the act of 1897, already mentioned, was passed and that act, it is seen, authorized the commissioner, when any portion of the interest due by the purchaser had not been paid, to declare a forfeiture of the purchase without judicial aid, and it gave to his action the effect of putting an end to the contract. *It was under the act of 1897 that the forfeiture was declared in that case. There, as here, it was contended that the act of 1897 violated the contract between the parties.* It was urged that as the act of 1879 provided a remedy by a resort to judicial proceedings for the purpose of enforcing a forfeiture, that such remedy was a part of the contract, and that the act of 1897, which provided for a forfeiture of the lands without judicial action, was a violation of the contract, and therefore void. *This court held that the stipulation in the twelfth section of the act of 1879, providing for a judicial forfeiture, did not amount in legal contemplation to a promise by the State that the only remedy which might thereafter be resorted to by it was the one therein provided for. The court recognized the plain distinction between the obligation of a contract and a remedy given by the legislature to enforce that obligation, and it held that the remedy might be modified and enlarged without impairing such obligation.*" (Italics are ours.)

The cases of *Hill vs. Merchants Insurance Company, supra,* and *Waggoner vs. Flack, supra,* were cited with approval and followed in the case of *Bernheimer vs. Converse,* 206 U. S. 516, where this Court had under consideration the enforcement of the assessment liability of a stockholder in a corporation under the constitution and statutes of the State of Minnesota. Stating the contention of the appellant and discussing the same, this Court, speaking through Mr. Justice Day (206 U. S. at page 529), said:

"The fundamental contention upon which the argument of the plaintiffs in error against the constitutionality of this subsequent act rests is that the statute created a contract into which the stockholder entered upon subscribing to or obtaining his stock, which the legislature had no power to change without running counter to the constitutional requirement invalidating laws impairing the obligation of contracts. Constitution, art. 1 Sec. 10.

"It may be regarded as settled that, upon acquiring stock, the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature, and, as such, capable of being enforced in the courts not only of that state, but of another state and of the United States (*Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477), although the obligation is not entirely contractual, and springs primarily from the law creating the obligation (*Christopher v. Norwell*, 201 U. S. 216, 50 L. ed. 732, 26 Sup. Ct. Rep. 502).

"*Is there anything in the obligation of this contract which is impaired by subsequent legislatiton as to the remedy, enacting new means of making the liability more effectual?* The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. *That is his contract, and the duty which the statute imposes, and that is his obligation.* Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution. *But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which*

simply undertake to give a more efficient remedy to enforce a contract already made.

"This principle was stated by Mr. Chief Justice Marshall in *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529, as follows:

" 'The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation . . . exists in the nature of things, without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.'

"The same rule is recognized in *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 33 L. ed. 994, 10 Sup. Ct. Rep. 589, *wherein a statute was sustained changing the character of the remedy against stockholders in common to one giving a direct remedy against an individual stockholder.* The principle was clearly enunciated in *Waggoner v. Flack*, 188 U. S. 595-603, 47 L. ed. 609-613, 23 Sup. Ct. 345-348, in which Mr. Justice Peckham, speaking for the court, said:

"To enact laws providing remedies for a violation of contracts, to alter or enlarge those remedies from time to time as to the legislature may seem appropriate, is an exercise of sovereignty, and *it cannot be supposed that the state, in a case like this, contracts in a public act of its legislature to limit its power in the future, even if it could do so, with or without consideration, unless the language of the act is so absolutely plain and unambiguous as to leave no room for doubt that its true meaning amounts to a contract by it to part with its power to increase the effectiveness of existing remedies.*'

"See, also, *Wilson v. Standefer*, 184 U. S. 399, 46 L. ed. 612, 22 Sup. Ct. Rep. 384; *New Orleans City & Lake R. Co. v. Louisiana*, 157 U. S. 219, 39 L. ed. 679, 15 Sup. Ct. Rep. 581." (Italics are ours.)

The Supreme Court of Iowa, in the case at bar, cited the case of *Henley vs. Myers*, 215 U. S. 373; 30 S. Ct. 148, 54 L. ed. 240, wherein this Court had under consideration a statute

which altered the manner of transferring stock in a corporation requiring the stockholder to file with the Secretary of State a statement of such change of ownership, etc. This was an additional limitation upon the right to transfer stock, a matter concerning the relationship between the state and the stockholder and the stockholders inter sese. This was challenged in the cited case as an impairment of the obligation of the stockholder's contract but that contention was overruled by this Court, speaking through Mr. Justice Harlan, in 215 U. S. at 385, wherein it was declared:

> "Equally without merit is the contention that the statute of 1899 impaired the obligations of the stockholder's contract, in that it substituted for individual actions against them a suit in equity by a receiver appointed after judgment against the corporation. *In becoming stockholders, the defendants did not acquire a vested right in any particular mode of procedure adopted for the purpose of enforcing their liability as stockholders.* It is a well-established doctrine that mere methods of procedure in actions on contract, that do not affect the substantial rights of parties are always within the control of the state. It is to be assumed that parties make their contracts with reference to the existence of such power in the state."

CONCLUSION

The Act of 1894 (the appellee bank reincorporated and renewed its corporate existence in 1911) imposed *"the liability for an assessment upon the stockholder"* (appellant); provided that the board of directors should cause any deficiency in the capital stock to be made good *"by a ratable assessment upon the stockholder"* (appellant); required the notice thereof to the stockholder to recite *"the entire sum to be raised, and the amount due from the addressed stockholder"* (appellant); provided that should any stockholder

"neglect or refuse to pay his assessment" for a specified time that notice of the sale of a sufficient amount of his stock to make good the deficiency (in capital stock) which notice shall *"recite the assessment made,* (and) *the amount due thereunder from the stockholder."*

The title to the act provided for:

> "An act to provide for the better security of depositors in state and savings banks organized under the laws of Iowa."

This act unquestionably imposed a liability for such assessment upon the stockholder, and not merely a liability upon the stock in rem. Every provision of the act indicates this intent of the Legislature.

The act challenged in this suit provides that if the sale of stock of any stockholder be insufficient to satisfy "his entire assessment liability" he shall be personally liable for that deficiency. This merely makes his other property subject to judgment and execution for the remainder of his liability already existing and imposes not one whit of additional liability.

The title to the act provides for an amendment relating to "the collection of assessments against stockholders in banks."

The Supreme Court of Iowa held that the later enactment was remedial only and provided only for the collection of a liability already existing. Appellant contends that this holding is arbitrary and unreasonable and deprives appellant of his property without due process of law and that appellant was not given his day in court.

Such is not the case. The opinion of the Supreme Court of Iowa is sound in logic and well reasoned. No other construction could be placed upon a statute so plainly stating the intent of the legislature in passing the act, which is the law.

The inherent purpose of the original act was to provide for "better security for depositors in state and savings banks." It provided the stockholder's liability and appellant entered into his contract with the state, purchased his stock, reaped all the benefits of it over a long period of time, all with the act in full force and effect. He had no contract that the state would not alter the remedy.

Appellant's contention is especially unfounded when it is recalled that the state, long prior to the contract (articles of incorporation), reserved unto itself the power to alter or abridge the contract when deemed necessary for the public good; *the very contract he now attempts to stand upon and cry "impairment."*

Appellant may as well attempt to raise himself by his own bootstraps, for, as said by Mr. Justice Miller in *Greenwood vs. Freight Company*, 105 U. S. 13 at page 20:

> "A provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, *and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation.*" (Italics are ours.)

Therefore, since appellant agreed to the contract, how can his obligation be impaired? How can he be denied due process of law when he agreed that the legislature could do exactly what it did do?

The statute is in the public interest. While it is not in the record, it may serve as an example. The subject bank has since closed. The stockholders who paid the assessment which appellant refused to pay to keep the bank solvent will now be called upon to pay another assessment for the benefit of creditors. Then the creditors lose.

Shall appellant go hence free from a liability clearly imposed upon him by his contract the benefits of which he enjoyed over many years?

The opinion of the Supreme Court of Iowa recognizes the intent of the legislature, gives effect to the appellant's contract, properly holds the challenged act an authorized change in remedy to collect an existing liability, is sound in logic and well reasoned, is well supported by highest authority, and should be affirmed by this court.

Respectfully submitted,

JOHN FLETCHER,

Attorney General.

EARL F. WISDOM,

Assistant Attorney General.

Counsel for Amicus Curiae

Service of the within and foregoing brief amicus curiae, and motion for leave to file same and to present oral argument thereon upon submission of this cause, is hereby accepted and the receipt of a copy thereof acknowledged on

this.....day of February, A. D. 1932.

.....

.....

.....

Counsel for Appellant.

.....

.....

.....

Counsel for Appellee.